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STEVEN SCHMITZ, ET AL. CA 15 103525

vs.

Judge:

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
ET AL.

Pages Filed: 37

No. CA-15-103525

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

ESTATE OF STEVEN T. SCHMITZ and YVETTE SCHMITZ,
individually and as Fiduciary of Estate of Steven T. Schmitz, Deceased,

Plaintiff-Appellant,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
and UNIVERSITY OF NOTRE DAME,

Defendants-Appellees.

APPEAL FROM THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO
CASE NO. CV 14-834486

BRIEF OF APPELLEE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

ORAL ARGUMENT REQUESTED

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ASSIGNMENT OF ERROR

Appellants Estate of Steven T. Schmitz and Yvette Schmitz assign the following error:

> The trial court erred by granting the Motions to Dismiss, because the Complaint's allegations are sufficient to state each claim, and the Complaint does not conclusively show on its face that Plaintiffs-Appellants' claims are barred by any statute of limitations. (Decision and Entry, September 1, 2015).

COUNTERSTATEMENTS OF ISSUES PRESENTED FOR REVIEW

1. Where the Plaintiff alleges that his bodily injuries occurred nearly forty years ago, did the trial court correctly dismiss the Plaintiff's claims as time-barred by Ohio's two year statute of limitations?

2. Did the trial court properly dismiss the Plaintiffs' claims for the separate and independent reasons that the First Amended Complaint fails to state a claim for relief under Ohio Rules of Civil Procedure 12(b)(6) and 9(b)?

I. INTRODUCTION & SUMMARY

In the First Amended Complaint, Plaintiff-Appellant Steven Schmitz alleges that he suffered head injuries between 1974 and 1978, while playing running back and wide receiver for the University of Notre Dame football team. Mr. Schmitz further alleges that he only realized the full extent of these head injuries some forty years later, in 2012. Under well-established Ohio law, the two year statute of limitations governing Mr. Schmitz's claims began to run at the time his injuries occurred, and not at some later point in time when he claims to have realized the full extent of his injuries. *See, e.g., Pingue v. Pingue,* 2004-Ohio-4173, at ¶ 20 (5th App. Dist. Aug. 9, 2004) ("What appellant has recently discovered is not that he was injured, but rather the extent of his injuries. Generally, an injured person's cause of action accrues when he knows of the injury, but he need not be aware of the extent of the injury . . ."). The trial court thus correctly concluded that Mr. Schmitz's claims – brought in 2014, some ***forty years after his injuries occurred*** – are time-barred by the applicable two year statute of limitations.

Indeed, statutes of limitations are designed to prevent cases like this from proceeding past the motion to dismiss stage. The Ohio Supreme Court has made clear that "statutes of limitations serve a gate-keeping function for courts" by avoiding "the difficulties of proof present in older cases." *Pratte v. Stewart*, 125 Ohio St. 3d 473, 481 (2010). Here, Mr. Schmitz's claims are based on alleged events that occurred at college football practices and games in a different state some forty years ago – there is no doubt that "evidence has been lost, memories have faded, and witnesses have disappeared." *The Ohio Hospital Association v. Armstrong World Industries*, 2000 Ohio App. LEXIS 1538, at *10 (8th App. Dist. Apr. 6, 2000). Affirming the trial court and enforcing the applicable two year statute of limitations will thus not only be consistent with a long line of precedent, but will also avoid the enormous judicial inefficiencies that would result from trying this forty year old case.

The trial court's dismissal should also be affirmed for the separate and independent reason that each of the claims asserted against the National Collegiate Athletic Association ("NCAA") fails under Ohio Rules of Civil Procedure 12(b)(6) and/or Rule 9(b):

- Mr. Schmitz's claims for breach of express contract and breach of implied contract (Counts IV and V) should be dismissed for the simple reason that the First Amended Complaint fails to adequately allege the existence of any contract – express or implied – between the NCAA and Mr. Schmitz.

- Mr. Schmitz's claim for "fraudulent concealment" (Count II) should be dismissed because no such cause of action exists, and even if it did, the First Amended Complaint fails to plead this fraud-based claim with the heightened particularity required by Rule 9(b). Similarly, Mr. Schmitz's claim for "constructive fraud" (Count III) also fails under Rule 9(b)'s heightened pleading standard.

- Mr. Schmitz's claim for negligence (Count I) should be dismissed because the First Amended Complaint fails to adequately plead that the NCAA undertook a specific duty recognized under law with respect to the claims alleged in the First Amended Complaint. In the absence of any duty recognized under law, Mr. Schmitz's negligence claim fails – as one court held as recently as August 2015 in a case involving similar allegations brought by a student-athlete against the NCAA. *Lanni v. National Collegiate Athletic Assoc.*, 2015 Ind. App. LEXIS 599 at *27-28 (Ct. App. Ind. Aug. 26, 2015) ("The NCAA's conduct does not demonstrate that it undertook or assumed a duty to actually oversee or directly supervise the actions of the member institutions and the NCAA's student athletes.").

- Finally, because Mr. Schmitz's claims are time-barred or otherwise fail as a matter of law, the derivative loss of consortium claim asserted by his wife, Plaintiff-Appellant Yvette Schmitz, must also fail.

For these reasons, and for those stated more fully herein, Defendant-Appellee NCAA respectfully requests that this Court AFFIRM the decision of the trial court and dismiss the First Amended Complaint in its entirety, with prejudice.

II. STATEMENT OF THE CASE

Plaintiffs Steven and Yvette Schmitz (individually, a "Plaintiff" and collectively, "Plaintiffs") commenced this action in the Cuyahoga County Court of Common Pleas on

October 20, 2014. (R. 1.)[1] On December 22, 2014, Defendants NCAA and the University of Notre Dame ("Notre Dame") each filed separate motions to dismiss. (R. 13-16.) NCAA argued that the Plaintiffs' claims were time-barred and that Plaintiffs had failed to state a claim under Rule 12(b)(6). (*Id.*)

On January 22, 2015, Plaintiffs filed an opposition to the motions to dismiss. (R. 19.) Plaintiffs simultaneously filed a motion for leave to file the First Amended Complaint, which was attached to the motion for leave. (R. 20.) The First Amended Complaint was substantially-similar to the originally-filed complaint, except that Plaintiffs strategically replaced the phrase "injuries" in the originally-filed complaint with the word "impacts" in the First Amended Complaint, in an apparent effort to avoid the well-settled rule under Ohio law that a statute of limitations begins to run when the "injury" occurs. *Compare, e.g.,* original complaint (R. 1) at ¶ 18 ("At no time during his participation on the Notre Dame football team was Plaintiff Steve Schmitz in a position to understand or appreciate the risks of concussive and sub-concussive ***injuries***,"), with FAC at ¶ 18 ("At no time during his participation on the Notre Dame football team was Plaintiff Steve Schmitz in a position to understand or appreciate the risks of concussive and sub-concussive ***impacts***."). The trial court granted the motion for leave to file the First Amended Complaint. (R. 22.)

On March 3, 2015, NCAA and Notre Dame again filed motions to dismiss. (R. 26-28.) NCAA moved to dismiss each of the claims asserted against it: negligence (Count I), "fraudulent concealment" (Count II), constructive fraud (Count III), breach of express contract (Count IV), breach of implied contract (Count V), and loss of consortium (Count VII). NCAA asserted two

[1] Citations to "R. __" are to the Pagination of Record compiled pursuant to Ohio Rule of Appellate Procedure 10(B). Citations to "FAC" are to the operative First Amended Complaint (R. 20, 22).

separate and independent grounds for dismissal: (i) Plaintiffs' claims were barred in their entirety by operation of the two year statute of limitations governing claims for bodily injuries, and (ii) Plaintiffs failed to state a claim for relief under Rule 12(b)(6) and (for the fraud-based claims) under Rule 9(b)'s heightened pleading standard.

After full briefing, the trial court granted the motions to dismiss in their entirety. (R. 41.)

III. STATEMENT OF FACTS[2]

A. Defendants NCAA and Notre Dame.

Defendant NCAA is a voluntary, unincorporated association comprising over 1,200 members – including colleges, universities and athletic conferences. (FAC ¶ 23.) Defendant Notre Dame is a private university located in Notre Dame, Indiana. (*Id.* at ¶ 26.) Notre Dame was a member of the NCAA in the 1970s and continues to be a member today. (*Id.* at ¶ 28.)

B. Mr. Schmitz suffered head injuries forty years ago while playing football at Notre Dame.

In the spring of 1974, Plaintiff Steven Schmitz signed a "letter of intent" and accepted a scholarship to play football at Notre Dame. (*Id.* at ¶ 16.) Mr. Schmitz played on the Notre Dame football team as a wide receiver and running back between 1974 and 1978. (*Id.* at ¶ 1.)

Throughout the First Amended Complaint, Mr. Schmitz alleges that he suffered "head injuries" (or "impacts") while playing football at Notre Dame, and that he immediately experienced the symptoms of those injuries:

- FAC at ¶ 19 (alleging that Mr. Schmitz suffered "repetitive concussive blows and/or sub-concussive blows to the head [] while playing running back and receiver on the Notre Dame college football team");

[2] The facts recited herein are drawn from the First Amended Complaint and are taken as true for the limited purpose of adjudicating the motion to dismiss, and this appeal thereof.

- FAC at ¶ 43 (alleging that Mr. Schmitz "was subjected to repetitive concussive and sub-concussive impacts in practices and games");
- FAC at ¶ 58 (alleging that the NCAA and Notre Dame encouraged players to "inflict ***head injuries*** on opponents and, therefore, themselves");
- FAC at ¶ 62 (alleging that it "was a common method during Notre Dame football games and practices for players to use their helmeted heads . . . to inflict on each other . . . concussive and sub-concussive ***head injuries***");
- FAC at ¶ 64 (alleging that "[o]n many occasions in drills, practices and games, [Mr. Schmitz] experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place");
- FAC at ¶ 105 (alleging that Notre Dame "rewarded Steve Schmitz for inflicting ***head injuries*** on himself and others and compelled him to ignore concussion symptoms");
- FAC at ¶ 127 ("Plaintiff Steve Schmitz experienced repetitive sub-concussive and concussive brain impacts during his college football career.");
- FAC at ¶ 129 (referring to "***injuries [Mr. Schmitz] sustained while playing football at Notre Dame***") (all emphasis added);

Although the First Amended Complaint makes clear that Mr. Schmitz's injuries occurred between 1974 and 1978, and that Mr. Schmitz was aware of these injuries when they occurred, the First Amended Complaint goes on to allege that certain symptoms of his injuries only "developed over time and were manifest later in life." (*Id.* at ¶ 129.) The First Amended Complaint alleges that Mr. Schmitz only became aware of these symptoms – which allegedly include "severe memory loss, cognitive decline, Alzheimer's, traumatic encephalopathy, and

dementia," *id.* at ¶ 19 – at an appointment with the Cleveland Clinic on December 31, 2012 – nearly forty years after Mr. Schmitz first started playing football at Notre Dame.

IV. ARGUMENT

A. Standard of Review

The Journal Entry granting the motions to dismiss did not specify the grounds on which the Plaintiffs' claims were dismissed. *See* R. 41. Accordingly, this Court should "conduct a *de novo* review of the complaint to determine whether dismissal was appropriate." *Salupo v. Fox*, 2004-Ohio-149, at ¶¶ 6-8 (8th App. Dist. Jan. 15, 2004). Plaintiffs agree that this Court should "examine each claim separately to determine whether Plaintiffs-Appellants pled sufficient facts to withstand the Motions." Plaintiffs-Appellants' Brief ("Plaintiffs' Br.") at 9.

B. Plaintiff's claims are barred by the applicable statute of limitations.

1. Dismissal on statute of limitations grounds is appropriate and routine.

Under Ohio Rule of Civil Procedure 12(b)(6), a motion to dismiss should be granted where it appears "on the face of the complaint that [a plaintiff] could prove no set of facts entitling him to recover." *Baxley v. Harley-Davidson Motor Co., Inc.*, 172 Ohio App. 3d 517, 518-19, 875 N.E.2d 989, 989-90 (1st App. Dist. 2007). While the allegations of a complaint are to be taken as true on a motion to dismiss, "a trial court does not have to presume the truth of legal conclusions asserted in the complaint when they are unsupported by factual allegations." *Coventry Group Inc. v. Gottlieb*, 2014-Ohio-213 at ¶ 10, 7 N.E.3d 611, 612 (8th App. Dist. 2014).

Courts in Ohio (including the Supreme Court) routinely grant or affirm motions to dismiss on statute of limitations grounds – contrary to the assertion in the Plaintiffs' Brief that a statute of limitations defense may only be raised in a responsive pleading. *See, e.g., Pratte*, 125 Ohio St. 3d 473 (affirming dismissal of claims on statute of limitations grounds); *Baxley,* 172

Ohio App. 3d 517 (same); *Swanson v. BSA*, 2008-Ohio-1692, at ¶ 14 (same); *Mitchell v. Speedy Car X*, 127 Ohio App. 3d 229 (9th App. Dist. 1998) (same); *Thomas v. Galinsky*, 2004-Ohio-2789 (11th App. Dist. May 28, 2004).

2. All of Plaintiff's claims are governed by the two year-statute of limitations contained in O.R.C. § 2305.10.

Ohio Revised Code § 2305.10 prescribes the statute of limitations governing claims for bodily injury: "[A]n action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. . . ." O.R.C. § 2305.10.[3] The Ohio Supreme Court has held that the two year statute of limitations contained in § 2305.10 applies to ***all claims*** asserted by a plaintiff alleging bodily injuries – whether the claim be brought in tort, contract, or otherwise:

> On its face, it clearly covers all actions based on a claim respecting bodily injury. Surely, the General Assembly did not intend to create different periods of limitation for the recovery of damages growing out of bodily injury, depending on the form of the action brought. No matter what form is adopted, the essence of the action is the wrongful injury, and that it arose from the breach of an express or implied contract is immaterial.

Andrianos v. Community Traction Co., 155 Ohio St. 47, 51 (1951); *see also Nadra v. Mbah*, 119 Ohio St. 3d 305, 311 (2008) ("Clearly, R.C. 2305.10 applies to most cases involving bodily injury . . . whether based upon contract or tort . . .").

Plaintiffs argue in their Brief that their fraud-based claims are subject to a four-year statute of limitations, and their contract-based claims are subject to a 15-year statute of limitations. Although the claims would still be time-barred even if these statutes of limitations

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[3] Although Indiana substantive law governs Plaintiffs' claims, *see infra* at 18-19, Ohio law provides the applicable statute of limitations, which is procedural in nature. *See, e.g., Capital One Bank (USA), N.A. v. Rodgers*, 2010-Ohio-4421, at ¶¶ 17-19 (5th App. Dist. Sept. 14, 2010) ("In choice-of-law situations, the procedural laws of the forum state, including applicable statutes of limitations, are generally applied.").

applied, *see infra* at 22-23, 24 n.7, Plaintiffs never address *Andrianos*, *Nadra*, or other decisions of the Ohio Supreme Court which make clear that "in determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded." *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183 (1984). Here, it is clear that the actual subject matter of the case is the head injuries Mr. Schmitz allegedly suffered while at Notre Dame, and not any unique injuries related to the fraud and breach of contract alleged in the First Amended Complaint. Accordingly, the two year statute of limitations governs each claim asserted by Mr. Schmitz. *Erickson v. Management & Training Corp.*, 2013-Ohio-3864, at ¶ 46 (11th App. Dist. Sept. 9, 2013) ("Based on the nature of Erickson's claims, the two year limitation period for bodily injury, set forth in R.C. 2305.10(A), is applicable despite their denomination as a breach of contract.").

3. **Plaintiff's claims accrued nearly forty years ago, at the time he alleges he was injured, and are thus time barred.**

Section 2305.10 states that "a cause of action accrues under this division when the injury or loss to person or property ***occurs***." O.R.C. § 2305.10 (emphasis added). Put simply, under Ohio law, the claim accrues and the statute of limitations begins to run when the injury ***occurs***. *See, e.g., Thomas*, 2004-Ohio-2789 (affirming dismissal of claims under § 2305.10 where action was brought more than two years after injuries occurred); *Braxton v. Peerless Premier Appliance Co.*, 2003-Ohio-2872 (8th App. Dist. June 5, 2003).

Here, the First Amended Complaint plainly alleges that Mr. Schmitz's head injuries occurred no later than 1978, when Mr. Schmitz last played football for Notre Dame. *See supra* at 6-7; *see also* FAC at ¶ 127 ("Plaintiff Steve Schmitz experienced repetitive sub-concussive and concussive brain impacts during his college football career."). Accordingly, under § 2305.10, Mr. Schmitz's claims accrued no later than 1978, and the two year statute of limitations

governing each of Mr. Schmitz's claims expired no later than 1980 – meaning that this action, commenced in 2014, is time-barred and should be dismissed in its entirety. *Swanson v. BSA*, 2008-Ohio-1692, at ¶ 14 (4th App. Dist. April 2, 2008) ("Swanson's complaint asserts that ***she suffered a traumatic brain injury as a result of a fall*** that occurred on July 4, 2002. However, she failed to file her complaint until March 16, 2007, which was well after the two year statute of limitations . . . [W]e find that the trial court did not err in dismissing those claims pursuant to Civ. R. 12(b)(6).").

4. **The discovery rule does not save Plaintiff's claims.**

a. **Mr. Schmitz's head injuries were not latent.**

Under the so-called "discovery rule," in certain limited circumstances involving latent injuries, a statute of limitations may be tolled until the plaintiff discovers that he or she has been injured. *See, e.g., Braxton*, 2003-Ohio-2872 at ¶ 12 ("Generally speaking, the discovery rule holds that when an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of the defendant, for purposes of the statute of limitations contained in R.C. 2305.10.") (quotations omitted). But the discovery rule does not apply here because the First Amended Complaint plainly alleges that Mr. Schmitz experienced concussion symptoms and knew he was injured immediately after suffering his injuries on the playing field in the 1970s: "On many occasions in drills, practices and games, he experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place." FAC at ¶ 64; *see also id.* at ¶ 39 ("[S]ymptoms of sub-concussive and/or concussive brain impacts can appear hours or days after the impact, indicating that the impacted party has not healed from the initial blow."). Mr. Schmitz's immediate knowledge of his injuries definitionally means the injuries were not latent and defeats application of the discovery rule.

Baxley, 172 Ohio App. 3d at 520 ("Baxley did not suffer from a latent injury. He immediately knew that he had been hurt . . . ").

Indeed, appellate courts in Ohio have generally limited application of the discovery rule to cases involving exposure to asbestos or some other invisible toxin, or to medical malpractice cases where the malpractice only becomes evident later in time. *See, e.g., Flynn v. Bd. of Trs. of Green Twp.*, 2006-Ohio-6622, at ¶ 8 (1st App. Dist. Dec. 15, 2006) ("The discovery rule has generally been more appropriately applied to cases of medical malpractice, and in actions against manufacturers for injuries resulting from exposure to asbestos."). At Footnote 1 of their Brief, Plaintiffs dispute that the discovery rule is generally limited to cases involving asbestos, invisible toxins or medical malpractice – and then spend the next five pages relying exclusively on cases involving asbestos, toxins or medical malpractice.[4] Plaintiffs rely most heavily on *Liddell v. SCA Servs.*, 70 Ohio St. 3d 6 (1994), in support of their argument that the discovery rule should apply here – but, by Plaintiffs own admission, *Lidell* involved an undetected "latent cancer" caused by air toxins. Plaintiffs. Br. at 18. In fact, Plaintiffs ***do not cite a single case*** in which an Ohio court has applied the discovery rule to head or brain injuries caused by a blow to the head. To the contrary – in the only Ohio case affirmatively cited by Plaintiffs involving a head injury, the appeals court refused to apply the discovery rule, holding that the statute of limitations began to run when the plaintiff's head injury actually occurred, and not at some later point in time. *Mahdi Al-Mosawi v. Plummer*, 2012-Ohio-6034 (2d App. Dist. Dec. 21, 2012).

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[4] *See* Plaintiffs' Br. at 13-18 (citing (i) *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84 (1983) (referred to by Plaintiffs as "Ohio's definitive asbestos exposure case"); (ii) *Colby v. Terminix International Co., L.P.*, 1997 Ohio App. LEXIS 1043 (5th App. Dist. Feb.10, 1997) (invisible chemicals); (iii) *Grimme v. Twin Valley Community Local School Dist. Bd. of Edn.*, 173 Ohio App.3d 460 (12th App. Dist. 2007) (invisible Freon leak); (iv) *Williams v. Boston Scientific Corp.*, 2013 U.S. Dist. LEXIS 43427 (N.D. Ohio Mar. 27, 2013) (medical malpractice)).

The reason Ohio courts have not applied the discovery rule to cases involving injuries like those alleged by Mr. Schmitz is evident: unlike cases involving invisible toxins, or a medical device implanted during surgery, a plaintiff who has suffered a blow to the head is likely to immediately know that he or she has been injured. *Braxton*, 2003-Ohio-2872 at ¶ 14 ("[A]s Braxton himself concedes, the injury manifested itself immediately. The discovery rule is therefore inapplicable here and Braxton's cause of action began to accrue immediately . . . ."). Such is the case here, where the First Amended Complaint clearly alleges that Mr. Schmitz suffered repeated blows to the head and immediately experienced symptoms from those blows. *See, e.g.,* FAC ¶ 64.

Because Mr. Schmitz's injuries were not latent, the discovery rule does not apply and Mr. Schmitz's claims accrued no later than 1978, when Mr. Schmitz last played football at Notre Dame.

b. **The discovery rule does not apply where a plaintiff only realizes the full extent of his or her injuries at some later point in time.**

Nor does the discovery rule apply simply because a plaintiff only came to understand the severity of his injuries years after the injuries occurred. Under Ohio law, "an injured person's cause of action accrues when he knows of the injury, but he need not be aware of the extent of the injury." *Pingue v. Pingue,* 2004-Ohio-4173, at ¶ 20 (5th App. Dist. Aug. 9, 2004); *see also Jones v. Hughey*, 153 Ohio App. 3d 314, 319-20, 794 N.E.2d 79, 83-84 (10th App. Dist. 2003) ("[A]n accrual of a cause of action is not delayed until the full extent of the resulting damage is known.") (internal citations omitted). Thus, the fact that Mr. Schmitz now pleads that he only became aware of the full extent of his injuries in December 2012 – nearly forty years after he began playing football at Notre Dame – does not save his claims from the statute of limitations.

Pingue is directly on point. In *Pingue*, the plaintiff sustained head injuries between 1962 and 1990 and was told, in 2002, that the injuries had caused "irreversible brain injury" and had increased the risks of "contracting Parkinson's disease and Alzheimer's disease." *Pingue*, 2004-Ohio-4173, at ¶ 10. The court of appeals held that plaintiff's cause of action accrued no later than 1990 – when plaintiff last suffered a head injury – and expressly rejected plaintiff's argument that his cause of action accrued only when he later learned the full extent of his injuries twelve years later, in 2002:

> What appellant has recently discovered is not that he was injured, but rather the extent of his injuries. Generally, an injured person's cause of action accrues when he knows of the injury, ***but he need not be aware of the extent of the injury*** . . . .This case provides an example of why courts have rejected discovery of the extent of injury as the trigger for the accrual for the cause of action. Appellant alleges he suffered an injury which may lead to a progressive disease like Parkinson's or Alzheimer's disease in the future. If we were to adopt a discovery of the extent of injuries standard, how would an injured party know when his injury has progressed sufficiently to trigger the running of the statute of limitations?

Id. at ¶¶ 19-20, 22 (emphasis added).

Here, Mr. Schmitz pleads that the symptoms of his head injuries "developed over time and were manifest later in life." FAC ¶ 129. But this is irrelevant under *Pingue* – the fact that the full extent of his injuries was only manifest later in life does not change the fact that Mr. Schmitz knew he had suffered an injury at the time he sustained the alleged blows to his head, as alleged throughout the First Amended Complaint. *See, e.g., id.* at ¶ 64. This knowledge defeats the application of the discovery rule even if Mr. Schmitz was unaware, in 1978, of the severity or extent of his injuries.

Plaintiffs gloss over *Pingue* in one sentence of their Brief and instead focus on a case decided by a federal court in Minnesota, *In re: National Hockey League Players' Concussion Injury Litigation*, 2015 U.S. Dist. LEXIS 38755 (D. Minn. March 25, 2015). The *NHL* court

applied the laws of Minnesota, New York and the District of Columbia; it did not apply Ohio law. Applying the law of these foreign jurisdictions, the *NHL* court held that the injury suffered was "***an increased risk*** of developing serious latent . . . disorders and diseases." *Id.* at *17. The *NHL* court then held that, under the laws of Minnesota, New York and Washington, D.C., the statute of limitations did not begin to run until these increased risks became manifest. *Id.* But that is clearly not the law in Ohio, as *Pingue* and other cases makes clear: the "injury" which causes the statute of limitations to run in Ohio is the actual head blow or impact suffered by the plaintiff, ***not*** the subsequent manifestation of the risks of "progressive disease." Indeed, *Pingue* expressly rejected the argument that the "injury" which caused the statute of limitations to accrue was the risks of "a progressive disease like Parkinson's or Alzheimer's in the future" – the injury was the actual blow to the head. *NHL* is thus plainly inconsistent with Ohio law, and Plaintiffs ***cite no Ohio case law*** for the proposition that the statute of limitations for a head or brain injury should be tolled until the risks of that injury are fully manifest.

The trial court's decision should be affirmed under Ohio law.

5. **The claims are time-barred even if the discovery rule applies.**

For the reasons stated above, the discovery rule does not apply to Mr. Schmitz's claims, which accrued no later than 1978. But in the alternative, even if the discovery rule does apply, Mr. Schmitz's claims are still time-barred by the two year statute of limitations because it is clear from the face of the First Amended Complaint that Mr. Schmitz should have discovered his alleged injuries at least ten years before bringing his claims in 2014.

In cases where the discovery rule applies, the statute of limitations typically begins to run either (i) "upon the date on which the plaintiff is informed by competent medical authority that he has been injured," or (ii) "upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, whichever date occurs first." *O'Stricker v.*

Jim Walter Corp., 4 Ohio St. 3d 84, 90 (1983). Under the second prong of the discovery rule, a plaintiff "need not have discovered all the relevant facts necessary to file a claim in order to trigger the statute of limitations." *Norris v. Yamaha Motor Corp., USA*, 2009-Ohio-4158, at ¶ 41 (5th App. Dist. Aug. 17, 2009). "Constructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule."

It is clear from the allegations of the First Amended Complaint that, with the exercise of reasonable diligence, Mr. Schmitz should have discovered any alleged injury long before commencing this Action. Indeed, the First Amended Complaint suffers from a fatal and fundamental inconsistency. Plaintiffs cite a number of publicly-available studies which purportedly identified links between repeated blows to the head and various short-term and long-term ailments. FAC at ¶¶ 70-101. But the First Amended Complaint offers no plausible explanation as to why, in light of these publicly-available studies, Mr. Schmitz only brought his claims in 2014, nearly forty years after he last played football at Notre Dame. Based only on the information cited in the First Amended Complaint and with the exercise of reasonable diligence, Mr. Schmitz should have had constructive knowledge of his claims by 2003, at the latest, when the First Amended Complaint alleges that publicly-available studies partially-funded by the NCAA suggested a potential linkage between football and concussions. *See* FAC at ¶ 101.

In short, according to the First Amended Complaint, there was sufficient information in the public realm prior to 2012 such that Mr. Schmitz, with the exercise of reasonable diligence, should have discovered his injuries. Thus, even if the discovery rule applies (and it does not), Mr. Schmitz's claims are still barred by the two year statute of limitations. *See, e.g., Holmes v. Cmty. Coll.,* 97 Ohio App. 3d 678, 684-85, 647 N.E.2d 498, 501-03 (8th App. Dist. 1994) (cause

of action barred by two year statute of limitations where plaintiff should have known, through reasonable diligence, of injury more than two years before filing suit).[5]

6. **Dismissal advances the purposes of statutes of limitations.**

Finally, not only is dismissal on statute of limitations grounds consistent with well-settled precedent, but it is also consistent with the goals statutes of limitations are designed to promote. The Ohio Supreme Court has made clear that "statutes of limitations serve a gate-keeping function for courts" by "ensuring fairness to the defendant" and avoiding "the difficulties of proof present in older cases." *Pratte,* 125 Ohio St. 3d at 481; *see also U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitations designed to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"); *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 549-50 (6th Cir. 2000) (affirming dismissal where events "occurred more than fifty years prior to the filing of this lawsuit . . . It would [] be difficult, if not impossible, for a jury to fully understand the . . . context in which these [events] took place"). The Ohio Supreme Court has also emphasized that the discovery rule should not be applied by trial courts in a way that will lead to "an unending statute of limitations." *Flagstar Bank, F.S.B. v. Airline Union Mortgage Co.*, 128 Ohio St. 3d 529, 536 (2011).

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[5] Where the discovery rule applies, the statute of limitations begins to run on either "the date on which the plaintiff is informed by competent medical authority that he has been injured," or "the date on which, by the exercise of reasonable diligence, [he] should have become aware that he had been injured," ***whichever date occurs first***. *O'Stricker,* 4 Ohio St. 3d at 90. Here, even assuming the discovery rule applies, the statute of limitations began running under the second prong by 2003 at the latest. Thus, Mr. Schmitz's implausible allegation that "the first time" he was informed by "competent medical authority that [he] had suffered a brain injury related to playing football was on December 31, 2012," FAC at ¶ 20, is irrelevant to the analysis here, because that date is later in time than the 2003 accrual date under the second prong of the discovery rule.

Here, Mr. Schmitz's claims are based on alleged events that occurred at college football practices and games in a different state some ***forty years ago*** – there is no doubt that "evidence has been lost, memories have faded, and witnesses have disappeared." *Ohio Hospital Association*, 2000 Ohio App. LEXIS 1538 at *10. Sadly, Mr. Schmitz has passed away since the commencement of this lawsuit. The problems of proof and judicial inefficiencies that the trial court would be confronted with in presiding over this case would be enormous, and it is precisely these problems and inefficiencies which statutes of limitations are designed to prevent as part of their "gate-keeping function." And this "gate-keeping function" is especially important here, where the allegations of the First Amended Complaint are principally focused on instructions given orally by coaches on the football field, thereby implicating the memories of witnesses to those alleged instructions at practices and games 40 years ago. This is in sharp contrast to *O'Stricker* – a case relied upon heavily by Plaintiffs in arguing for application of the discovery rule – where the Ohio Supreme Court specifically noted that the proofs would largely be documentary and would not implicate the memories of witnesses. *O'Stricker*, 4 Ohio St. 3d at 89 ("Such a defense would necessarily rest on documentary evidence of sales of asbestos fireproofing products . . . Such documentary evidence, ***unlike that requiring the exercise of individuals' memories***, does not typically become less reliable over time.").

The trial court should accordingly be affirmed.

C. Even if not time-barred, the claims in the First Amended Complaint fail under Rule 12(b)(6) and Rule 9(b).

1. Plaintiffs' claims fail under either Indiana or Ohio law.

In order to determine which jurisdiction's substantive laws govern Plaintiffs' claims, this Court is to apply Ohio's choice-of-law rules. *See, e.g., Pevets v. Crain Communs., Inc.*, 2011-Ohio-2700, at ¶ 32 (6th App. Dist. June 3, 2011) ("We initially note that when addressing any

conflict of law, courts apply the choice-of-law rules of the forum state, in this case, Ohio."). For both tort and contract claims, Ohio applies the conflicts-of-laws principles identified in the Second Restatement of the Law of Conflicts. *See, e.g., Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d 339 (1984) (applying Restatement in tort action); *Ohayon v. Safeco Ins. Co.*, 91 Ohio St. 3d 474 (2001) (applying Restatement in contract action). Here, applying the Restatement, Indiana law applies to Plaintiffs' tort and contract claims because, *inter alia*, (i) Mr. Schmitz suffered his alleged injuries while playing for the Notre Dame football team in Notre Dame, Indiana, and (ii) even if a contractual relationship between the parties existed (which it did not, *see infra* at 20-22), the contract would have been performed during Mr. Schmitz's time in Indiana. *See* 1 RESTATEMENT OF THE LAW 2D, CONFLICT OF LAWS, § 146 ("In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless . . . some other state has a more significant relationship . . .").

Nevertheless, because the elements of the Plaintiffs' claims are substantially-similar under Indiana and Ohio law, dismissal is appropriate under the laws of either jurisdiction, and the trial court's order should be affirmed.

D. **Plaintiff's breach of contract claims should be dismissed.**

Plaintiff's contract claims against the NCAA were properly dismissed for a very simple reason: there was no contract between the NCAA and Mr. Schmitz. Because the First Amended Complaint pleads no set of facts to show that an express or implied contractual relationship existed between the parties, Mr. Schmitz's contract claims should be dismissed under Rule 12(b)(6).

1. The First Amended Complaint fails to allege the existence of any express written contract.

Count IV of the First Amended Complaint is for "Breach of Express Contract." To state a claim for breach of contract under Indiana and Ohio law, a plaintiff must first allege the existence of an actual contract. *WESCO Distrib. Inc. v. ArcelorMittal Ind. Harbor LLC*, 2014 Ind. App. LEXIS 550, at *54 (Ct. App. Ind. Nov. 10, 2014) (elements of breach of contract claims are "the existence of a contract, the defendant's breach of the contract, and the plaintiff's damages as a result of the breach"); *Carr v. Acacia County Club Co.*, 2012-Ohio-1940, at ¶ 37 (8th App. Dist. 2012) ("The elements ADC must prove on a breach of contract claim are (1) the existence of a contract . . . ."). To sufficiently plead the existence of a contract, a plaintiff must allege "an offer, acceptance, a manifestation of mutual assent, and consideration." *McIntire v. Franklin Twp. Cmty. School Corp.*, 15 N.E.3d 131, 134 (Ct. App. Ind. 2014).

Here, the First Amended Complaint is completely devoid of factual allegations to show that an express written contract existed between Mr. Schmitz and the NCAA. The First Amended Complaint vaguely refers to a written "form" which Mr. Schmitz was allegedly required to sign before joining the Notre Dame football team – but now, in their Brief, Plaintiffs confusingly argue the "form" was not the contract itself but rather "was part of the contract." But neither the First Amended Complaint nor the Plaintiffs' Brief identifies an actual written document purportedly constituting a contract between the NCAA and Mr. Schmitz. Nor does the First Amended Complaint allege (i) the terms of any written contract, (ii) the consideration exchanged as part of any written contract, or (iii) that the NCAA ever signed or otherwise agreed to be bound by any written contract. Tellingly, neither the "form" nor the "contract" are attached to the First Amended Complaint.

In short, the First Amended Complaint completely fails to allege or identify any written instrument constituting a contract between the NCAA and Mr. Schmitz, and dismissal of the breach of contract claim under Rule 12(b)(6) should be affirmed. *See McIntire*, 15 N.E. 3d at 134 ("There is nothing in the complaint which would suggest that it is, as McIntire now claims, based in contract. There is no allegation of the basic elements of a contract claim.").

2. The First Amended Complaint fails to state a claim for breach of an implied contract.

Perhaps recognizing that the "form" he unilaterally executed does not constitute a written contract, and that no other written contract exists, Mr. Schmitz also alleges, in Count V of the First Amended Complaint, that the NCAA breached a so-called "implied contract" between the parties. This claim also fails under Rule 12(b)(6).

Under both Indiana and Ohio law, an implied contract can only exist where the "acts and conduct of the parties" demonstrate "a meeting of the minds and a clear intent of the parties in the agreement." *In re: The Matter of J.W.*, 697 N.E.2d 480, 484 (Ct. App. Ind. 1998); *see also Salkin v. Case Western Reserve Univ.*, 2007-Ohio-1139 at ¶ 18 (8th App. Dist. 2007) (implied contract only exists where "the circumstances surrounding the parties' transactions make it reasonably certain that an agreement was intended"). Here, there is no set of facts in the First Amended Complaint sufficient to show that either (i) the parties intended to enter into any implied contract, or that there was a meeting of the minds between the parties as to the terms of any implied contract; or (ii) even if some implied contract existed, that the NCAA breached the terms of that implied contract. While the First Amended Complaint vaguely refers to the NCAA "Constitution and Bylaws" as providing the basis for an implied contract, FAC at ¶ 166, there are simply no facts alleged to show that the parties intended for the Constitution and Bylaws to constitute an implied contract. And courts in Indiana have rejected the idea that bylaws or

"handbooks" constitute implied contracts, as demonstrated by the very cases relied upon by Plaintiffs. *See McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 892 (Ct. App. Ind. 2007).

3. Mr. Schmitz's "contract" ended in 1978 and any contract claims would be barred by the statute of limitations, in any event.

Even if this Court were to find that the NCAA and Mr. Schmitz entered into an express or implied contract, such a contract would only have governed Mr. Schmitz's participation in NCAA football and would have ended in 1978, when Mr. Schmitz graduated from Notre Dame. Any rights or responsibilities arising out of the "contract" would have ended at the same time. Thus, any breach of the contract by NCAA must have occurred in or before 1978. Accordingly, Mr. Schmitz's breach of contract claims are barred by the statutes of limitations contained in O.R.C. §§ 2305.06 and 2305.07, which require a plaintiff to bring a contract claim within fifteen years (express written contract) or six years (implied contract) of the alleged breach of the contract.[6] Because any breach must have occurred prior to 1978 (when Mr. Schmitz stopped competing in college sports), the statute of limitations on his contract claims would have expired by 1993 (express) and 1984 (implied), respectively. And the discovery rule cannot save the breach of contract claims – Plaintiffs do not dispute that no Ohio court has ever applied the discovery rule to a claim for breach of contract, as this Court recognized only two years ago. *Pomeroy v. Schwartz*, 2013-Ohio-4920, at ¶ 39 (8th App. Dist. Nov. 7, 2013) (***"No Ohio courts have applied the discovery rule to a claim for breach of contract."***) (emphasis added).

[6] For the reasons stated above, *supra* at 9-10, the two year statute of limitations contained in O.R.C. § 2305.10 governs Plaintiff's contract claims. NCAA only identifies the fifteen and six year statute of limitations contained in O.R.C. §§ 2305.06 and 2305.07, respectively, in the event the Court concludes that the two year statute of limitations does not apply. Moreover, while O.R.C. § 2305.06 was amended in 2012 to change the statute of limitations for written contract claims to eight years, the 15-year statute applies to claims which accrued prior to 2012. *See Cook v. ProBuild Holdings, Inc.*, 2014-Ohio-3518 at ¶ 16 n.2 (10th App. Dist. 2014).

Thus, even if this Court were to find that the First Amended Complaint sufficiently pleads the existence of an express or implied contract between Mr. Schmitz and the NCAA, dismissal of the contract claims should still be affirmed because Plaintiffs only asserted these claims in 2014 – long after the statute of limitations had expired.

E. No cause of action for "fraudulent concealment" or "fraud by concealment" exists under Indiana or Ohio law.

Neither Indiana law nor Ohio law recognizes a cognizable cause of action for "fraudulent concealment" or "fraud by concealment." Indeed, the Ohio Supreme Court has expressly stated that "fraudulent concealment' does not provide an independent cause of action . . ." *Richards v. St. Thomas Hosp.,* 24 Ohio St. 3d 27, 29 n.3 (1986). Indiana courts have similarly recognized that fraudulent concealment is an equitable tolling doctrine and not an independent cause of action. *Burks v. Rushmore*, 534 N.E.2d 1101, 1104 (Ind. 1989) ("[T]he doctrine of fraudulent concealment . . . operates as an equitable doctrine to estop a defendant from asserting a statute of limitations when he has . . . prevent[ed] the plaintiff from discovering a potential cause of action.").

Plaintiffs argue that there is a cause of action under Indiana law called "fraudulent concealment," but then recite the elements of a garden variety fraud claim in support of their argument. Plaintiffs' Br. at 30 ("The elements of a claim of fraudulent concealment (or fraud by concealment) are similar to fraud. Under Indiana law, for example, ***the elements of fraud are as follows*** . . . ."). Plaintiffs then cite a case in which the plaintiff brought claims for "fraud" and "constructive fraud." *Wright Pennamped*, 657 N.E.2d 1223, 1229 (Ind. App. 1995). The plaintiff in *Wright* ***did not*** assert any claim called "fraudulent concealment," and Plaintiffs do not point to a single case in Ohio or Indiana in which a court recognized a cognizable cause of action for "fraudulent concealment."

Moreover, even if such a cause of action did exist, the First Amended Complaint fails to plead any sort of fraudulent conduct with the particularity required by Ohio Rule of Civil Procedure 9(b). OHIO R. CIV. P. 9(b) ("[I]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *see also CitiMortgage, Inc. v. Hoge*, 196 Ohio App. 3d 40, 48 (8th App. Dist. 2011) ("Failure to specifically plead the operative facts constituting an alleged fraud presents a defective claim. The particularity requirement of Civ. R. 9(B) means that the pleading must contain allegations of fact which tend to show each and every element of a cause of action for fraud."). Even assuming that Plaintiffs are correct that the elements of a claim for "fraudulent concealment" are similar to the elements of a garden variety fraud claim, the First Amended Complaint is completely devoid of any particularized allegations that the NCAA intended to deceive Mr. Schmitz into engaging in conduct which the NCAA knew would be harmful. Quite the contrary – the First Amended Complaint alleges that in 1976, during Mr. Schmitz's Notre Dame playing career, the NCAA actually "passed a safety rule prohibiting initial contact with the head" while tackling. FAC at ¶ 86. This plainly undermines the allegation that the NCAA intended to knowingly deceive Mr. Schmitz into engaging in harmful conduct.

For these reasons, the trial court's dismissal of the "cause of action" for fraudulent concealment should be affirmed.[7]

F. The First Amended Complaint fails to plead "constructive fraud" with the requisite particularity.

Plaintiff has similarly failed to plead his "constructive fraud" claim with the particularity required by Rule 9(b). To state a claim for "constructive fraud" a plaintiff must plead "(1) a duty

[7] As with the contract claims, even if this Court were to apply the four year statute of limitations for fraud claims (rather than the two year statute of limitations for bodily injury claims), Mr. Schmitz's fraud based-claims would have expired by 1982 (four years after Mr. Schmitz stopped competing in college sports), and would be time-barred.

owing by the party to be charged to the complaining party due to their relationship; (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (3) reliance thereon by the complaining party; (4) injury to the complaining party as a proximate result thereof; and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party." *Baehl v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 46445, at *23 (N.D. Ind. March 25, 2013). Under both Indiana and Ohio law, a claim for constructive fraud can only survive dismissal where the plaintiff pleads a "fiduciary or other 'special' relationship," or some other legal or equitable duty, between the plaintiff and the defendant. *Id.; see also Comfax Corp. v. North Am. Van Lines*, 587 N.E.2d 118, 125 (Ct. App. Ind. 1992) ("Comfax and Kuker have failed to carry their initial burden in demonstrating a special relationship between the parties that could form the basis of a constructive fraud claim."); *In re Estate of Sowande*, 2014-Ohio-5384, at ¶ 34 (11th App. Dist. 2014) ("Constructive fraud is the breach of a duty . . . [and] often exists where the parties to a contract have a special confidential or fiduciary relationship.").

Here, the First Amended Complaint fails to plead a specific fiduciary or other special relationship recognized by law between Mr. Schmitz and the NCAA that could give rise to a claim for constructive fraud. Plaintiff simply points to his "contract" with the NCAA and alleges, in conclusory fashion, that he had a "unique relationship" with the NCAA. *See* FAC at ¶ 144. Plainly, this is insufficient to state a claim for constructive fraud under the heightened pleading requirements of Rule 9(b).

G. The First Amended Complaint fails to allege any duty recognized by law and the negligence claim should accordingly be dismissed.

In order to state a claim for negligence under both Indiana and Ohio law, a plaintiff must allege that the defendant owes a specific legal duty to the plaintiff. *Marks v. Northern Ind. Pub.*

Serv. Co., 954 N.E.2d 948, 952 (Ct. App. Ind. 2011); *Caterpillar Fin. Serv's Corp. v. Tatman and Son's Enterprises, Inc.*, 2015-Ohio-4884, at ¶ 23 (4th App. Dist. 2015). Here, Mr. Schmitz's negligence claim should be dismissed because the First Amended Complaint fails to plead facts sufficient to show that the NCAA specifically undertook a duty recognized by law.

The Indiana Supreme Court[8] has made clear that – with respect to duties of care – college students are to be treated differently than primary or secondary school students: "Save for very few legal exceptions, [college students] are adult citizens, ready, able and willing to be responsible for their own actions." *Yost v. Wabash Coll., et al.*, 3 N.E.3d 509, 514 n.1 (Ind. 2014). Accordingly, colleges, fraternities and other on-campus entities – from which the NCAA is even further removed – typically do not owe "a general duty of care" to students. *Id.* Instead, a legal duty of care only arises where a party specifically "assumes such a duty, either gratuitously or voluntarily." *Id.* at 517. The "assumption of such a duty requires affirmative, deliberate conduct such that it is apparent that the actor . . . specifically [undertook] to perform the task that he is charged with having performed negligently. . ." *Id.; see also Marks*, 954 N.E.2d 948 at 955-56 ("[W]ithout actual assumption of the undertaking there can be no corresponding legal duty to perform the undertaking carefully."); *City of Muncie v. Weidner,* 831 N.E.2d 206, 212 (Ct. App. Ind. 2005) ("It is apparent that the actor must specifically undertake to perform the task he is charged with having performed negligently . . ."). While "the existence and extent of an assumed duty are ordinarily questions for the trier of fact, a court will decide the

[8] Although Indiana law should apply to all of Plaintiff's claims, it is particularly applicable to Plaintiff's claim for negligence, since Indiana was the locus of the parties' relationship and the place where the alleged injuries occurred. See 1 RESTATEMENT OF THE LAW 2D, CONFLICT OF LAWS, § 146 ("In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless . . . some other state has a more significant relationship . . ."). Nothing in the First Amended Complaint suggests that Ohio has a more significant relationship to this case than Indiana.

issue as a matter of law when the record contains insufficient evidence to establish such a duty." *Marks*, 954 N.E. 2d at 956. "Where there is no duty, there can be no breach, and thus the party cannot be found negligent." *Yost*, 3 N.E.3d at 515.

Indeed, just last August, the Indiana Court of Appeals applied *Yost* and other precedent to a similar case brought against the NCAA by a student-athlete. In rejecting the negligence claim asserted by the student-athlete, the Indiana Court of Appeals held ***that the NCAA had not assumed a specific duty recognized by law***:

> [T]he specific duties undertaken by the NCAA with respect to the safety of its student-athletes was simply to provide information and guidance to the member institutions and student-athletes . . . It is commendable for the NCAA to actively engage its member institutions and student-athletes in how to avoid unsafe practices, but those acts do not rise to the level of assuring protection of the student-athletes from injuries that may occur at sporting events. Actual oversight and control cannot be imputed merely from the fact that the NCAA has promulgated rules and regulations and required compliance with those rules and regulations. ***The NCAA's conduct does not demonstrate that it undertook or assumed a duty to actually oversee or directly supervise the actions of the member institutions and the NCAA's student athletes.***

Lanni, 2015 Ind. App. LEXIS 599 at *27-28.

As in *Lanni*, the First Amended Complaint here offers no set of facts to show that the NCAA took affirmative and deliberate steps to assume a duty recognized by law specifically to prevent the injuries alleged by Mr. Schmitz in the First Amended Complaint. Accordingly, this Court should affirm the dismissal of the negligence claim. *See Yost*, 3 N.E.3d at 518 ("Expressed another way, there is no direct evidence or reasonable inferences in this case to establish that Wabash deliberately and specifically undertook to control and protect Yost from the injuries he sustained . . . .").[9]

[9] *Lanni* is directly on-point because it applies governing Indiana law. The case attached as Exhibit C to Plaintiffs' Brief (*Onyschko v. NCAA*) applies Pennsylvania law and is therefore inapposite.

H. Plaintiff Yvette Schmitz's derivative claim for spousal loss of consortium fails because Mr. Schmitz's primary claims fail.

Plaintiff Yvette Schmitz asserts only one claim in this action, for loss of consortium against both the NCAA and Notre Dame. It is well-settled, however, that a "cause of action based upon a loss of consortium is a derivative action" – that is, "the derivative action is dependent upon the existence of a primary cause of action and can be maintained only so long as the primary action continues." *Young v. Zukowski*, 2010-Ohio-3491 at ¶ 13 (9th App. Dist. July 28, 2010); *Kouvakas v. Inland Steel Co.*, 646 F. Supp. 474, 478 (N.D. Ind. 1986) (holding that "claim for loss of consortium must likewise be dismissed because the claim is derivative of her husband's claim"). Thus, where the primary cause of action must be dismissed – because it is time-barred or otherwise fails as a matter of law – the derivative claim for loss of consortium must also be dismissed.

Here, as stated above, each of the primary claims for bodily injury asserted by Plaintiff Steven Schmitz should be dismissed as time-barred under the applicable two year statute of limitations or otherwise fails as a matter of law. Accordingly, the derivative loss of consortium claim asserted by Yvette Schmitz was also properly dismissed. *See Young*, 2010-Ohio-3491 at ¶ 13 ("Because the primary action (Shelley Young's bodily injury claim) cannot continue . . . Chad Young's derivative claim also must fail.").

V. CONCLUSION

For the reasons stated herein, Defendant National Collegiate Athletic Association respectfully requests that this Court AFFIRM the trial court's dismissal of the claims asserted in the First Amended Complaint.

Dated: January 29, 2016

Respectfully submitted,

/s/ Frederick R. Nance

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being served on the below this 29th day of January, 2016, via the Court's electronic filing system and by electronic mail and Federal Express.

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